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WAN MING SUN

v.

PLANET UNO SDN BHD

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COURT OF APPEAL, PUTRAJAYA
CLEMENT SKINNER JCA
LIM YEE LAN JCA
ROHANA YUSUF JCA
[CIVIL APPEAL NO: W-02-2786-11-2011]
20 FEBRUARY 2013

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CONTRACT: *Consideration - Sale of property - Option to sell - Option fee paid for property - Failure to pay balance instalments - Whether option fee constituted an advanced payment for purchase of property - Whether collection of advance payment violated reg. 11(2) Housing Development (Control and Licensing) Regulations 1989 - Whether a valid and binding contract existed - Whether agreement with unlawful consideration void and unenforceable - Contracts Act 1950, s. 25*

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The respondent ('plaintiff') was a developer of a residential development known as "Seputeh Gardens". The appellant ('defendant') was interested to purchase three units of bungalow in the said development. On his behalf, his mother was made to sign three separate documents each described as "option to sell". Pursuant to the option to sell, the defendant was required to pay an option fee of RM50,000 for each property. Upon acceptance of the option to sell by the plaintiff, the defendant paid the three option fee totalling RM150,000 through his solicitor Messrs LC Chang & Co to the plaintiff's solicitor Messrs Yap Liew & Partners, who held them as stakeholders. Messrs Yap Liew & Partners prepared the sale and purchase agreements ('SPAs') in respect of the properties and forwarded the SPAs for the execution of the defendant. The defendant executed the SPAs but did not pay the balance instalments provided under the SPA. Instead, the defendant decided not to proceed with the purchase and sought a refund of the option fee paid. The defendant contended that the three options to sell were void for lack of consideration, tainted with illegality and was not enforceable under the Contracts Act 1950. The defendant also pleaded misrepresentation. The plaintiff issued demands for the balance of the first instalment for the three units of bungalows totalling RM1,283,000. When no payments were received, the plaintiff sought from the High Court for a declaration that there was a valid contract of sale in respect of the three bungalow lots. On the other hand, the defendant counterclaimed for a refund of the option fee. The plaintiff contended that the consideration in the option to sell was that the plaintiff had reserved the three units of bungalow for the defendant's purchase and abstained from selling them to any

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other party. The abstention, according to him, constituted a valid consideration as spelled out under s. 2(d) of the Contracts Act 1950. The High Court found that there were binding agreements between the parties and that the three options to sell were conditional contracts to the sale and purchase agreement in respect of the properties. Hence, this appeal. The defendant's main complaint was that the High Court Judge failed to deal with the validity of the option to sell during the trial. The issues that arose for determination were (i) whether a promise to abstain constituted to a valid consideration under the Housing Development (Control and Licensing) Regulations 1989 ('the 1989 Regulations'); (ii) whether there was a valid and binding contract; and (iii) whether the option fee constituted to an advanced payment for the purchase of the properties.

Held (allowing appeal with costs)

Per Rohana Yusof JCA delivering the judgment of the court:

- (1) According to the clauses of the option to sell, the defendant was to pay an option fee of RM50,000 to the plaintiff for each property in order to give the plaintiff an option to sell the property to the defendant. It was strange that the defendant was made to pay a consideration of RM50,000 in order to give the plaintiff the right which was naturally with the plaintiff. (para 10)
- (2) Although a promise to abstain from doing something constitutes a valid consideration, the term was not spelled out in the document. Therefore, there was no valuable consideration moving from the plaintiff to the defendant to constitute a valid and binding agreement. (para 11)
- (3) For abstention to be a good consideration, it brought to the fore the 1989 Regulations. The plaintiff ignored the clear prohibition of reg. 11 of the said Regulations since it regulated the contract of sale of residential properties under development. Under reg. 11(2), a developer was prohibited from collecting any advance booking or payment for the purchase of such a property except as prescribed by the contract of sale. (paras 12 & 13)
- (4) The option fee imposed by the plaintiff was nothing more than advanced payment for the purchase of the properties. It was plain and obvious that the plaintiff was collecting in advance the purchase price which it was prohibited from collecting under reg. 11 of the 1989 Regulations. The option fee was therefore a guise to circumvent the mandatory requirement of reg. 11(2). Thus, the option for sale was an agreement prohibited by law. An agreement

- A with unlawful consideration and whose object was unlawful was void and unenforceable under s. 25 of the Contracts Act 1950. The option to sell agreement was an agreement which defeated the object of the regulation and should not be enforced by the court. Therefore, the learned High Court Judge had erred in upholding the option for sale as a conditional contract. The defendant's counterclaim for the refund of the option fee of RM150,000 was allowed. (paras 14-16)
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Case(s) referred to:

MK Retnam Holdings Sdn Bhd v. Bhagat Singh Surian Singh [1985] 1 CLJ 520;
C [1985] CLJ (Rep) 199 SC (*refd*)

Legislation referred to:

Contracts Act 1950, ss. 2(d), 24, 25
Housing Development (Control and Licensing) Regulations 1989, reg. 11(2)

- D *For the appellant - Jamie Wong Siew Min; M/s Ranjit Singh & Yeoh*
For the respondent - Preeti Shah; M/s Yap, Liew & Partners
- [Editor's note: For the High Court judgment, please see Planet Uno Sdn Bhd v. Wan Ming Sun [2011] 1 LNS 1571.]*
- E *Reported by Sandra Gabriel*

JUDGMENT

F Rohana Yusuf JCA:

- [1] This is an appeal against the decision of the High Court at Kuala Lumpur in allowing an originating summons by the plaintiff and disallowing the counterclaim by the defendant. On 20 February 2013, by a unanimous decision, we allowed the plaintiff's appeal with costs, set aside the order of the High Court and allowed the refund claimed by the defendant in his counterclaim. We now give our reasons.
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- [2] The brief facts leading to this appeal are these. We will refer to the parties as the plaintiff and the defendant as in the court below respectively.
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- [3] The brief facts leading to this appeal are these. The plaintiff is a developer of a residential development known as "Seputeh Gardens". The defendant who was then residing in Hong Kong was interested to purchase three units of bungalow in the said development. On his behalf his mother was made to sign three separate documents each described as "option to sell". These three documents relate to three units of
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bungalow, Lot 30, Lot 31 and Lot 18 ('the properties') which the defendant wanted to purchase. Pursuant to the option to sell, the defendant was required to pay an option fee of RM50,000 for each property. Upon acceptance of the option to sell by the plaintiff, the defendant paid the three option fee totalling RM150,000 through his solicitor Messrs LC Chang & Co to the plaintiff's solicitor Messrs Yap Liew & Partner, who held them as stakeholder.

[4] Messrs Yap Liew & Partner who was instructed to prepare the sale and purchase agreements ('SPAs') in respect of the properties forwarded the SPAs for the execution of the defendant on 5 February 2010. This was followed by two reminders on 23 February 2010 and 1 March 2010 respectively. The defendant executed the SPAs but did not pay the balance instalments provided under the SPA. Instead, through his solicitor's letter to the plaintiff, he decided not to proceed with the purchase, alleging misrepresentation. He then sought a refund of the option fee paid by him.

[5] The plaintiff issued demands for the balance of the first instalment pursuant to the Third Schedule of the SPAs in the following sums:

Lot 30	-	RM468,000	
Lot 31	-	RM510,000	
Lot 18	-	RM305,000	

Total	-	RM1,283,000	
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[6] When no payments were received, the plaintiff *vide* originating summons in encl. 1 sought for the following declarations, which were allowed by the High Court:

- (a) A declaration that there is a valid contract of sale in respect of the three bungalow lots;
- (b) A declaration that the plaintiff is entitled in law to forfeit a sum of RM1,493,000 equivalent to 10% of balance purchase price for the said properties;
- (c) An order compelling Messrs Yap Liew & Partners to hand over the option fee of RM150,000 held by them as stakeholders to the plaintiff within seven days from the order;

- A (d) An order compelling the defendant to pay the balance 10% deposit for the three bungalow lots amounting to RM1,283,000 to the plaintiff within seven days from the order; and
- (e) Interest on the sum of RM1,283,000 at the rate of 8% pa from the date of judgment until full settlement.
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[7] In his grounds of appeal the defendant's main complaint was that the learned High Court Judge failed to deal with his challenge on the validity of the option to sell, during the trial. It is the defendant's case that the three option to sell are void for lack of consideration, they were tainted with illegality and thereby not enforceable under the Contracts Act 1950. The defendant also pleaded misrepresentation, which the High Court found against him.

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[8] In his judgment the learned High Court Judge found that there were binding agreements between the parties. He further held that the three options to sell are conditional contracts to the sale and purchase agreement in respect of the properties.

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[9] We have examined the content of the options to sell in the bundle of document. All the three documents essentially contain similar, if not identical clauses. We need only refer to one for our reference. We note in particular the following clause:

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In consideration of the sum of Ringgit Malaysia only (RM50,000.00) hereinafter call the 'Option Fee' paid by me/is ... I/We the undersigned (hereafter called Purchaser) hereby grant to you an option to sell the Property to me/us ...

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[10] It appears from the above clause that the defendant was to pay on option fee of RM50,000 to the plaintiff for each property in order to give the plaintiff an option to sell the property to the defendant. We find this clause somewhat peculiar and perplexing. It is indeed strange that the defendant was made to pay a consideration of RM50,000 in order to give the plaintiff the right which is naturally with the plaintiff.

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[11] For one thing, the option to sell fails to disclose any consideration moving from the plaintiff to the defendant, to constitute a valid contract between them. In response to the argument by the defendant that the agreement lacked consideration, with which we agree, learned counsel for the plaintiff in both his oral and written submission subtitled that the consideration in the option to sell was that the plaintiff had reserved the three units of bungalow for the defendant's purchase and abstained from selling them to any other party. The abstention, according to him

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constitutes a valid consideration as spelled out under s. 2(d) of the Contracts Act. Whilst we agree with learned counsel that a promise to abstain from doing something, generally speaking, constitutes a valid consideration, we do not see this particular term spelled out in the document. We are prepared to hold that on the face of it, there is no valuable consideration moving from the plaintiff to the defendant to constitute a valid and binding agreement.

[12] However, if we were to accept the plaintiff's argument that its abstention is a good consideration, it brings to the fore the Housing Development (Control and Licensing) Regulations 1989. The plaintiff's submission ignores the clear prohibition of reg. 11 of the said Regulations. We say so for the following reasons. Regulation 11 regulates the contract of sale of residential properties under development as in the present case. Under reg. 11(2) a developer is prohibited from collecting any advance booking or payment for the purchase of such a property except as prescribed by the contract of sale. The facts revealed that at the point the option to sell was executed, and option fee were paid by the defendant, the prescribed contract of sale was not available in respect of the properties.

[13] Upon our examination of the option to sell, we are of the view that the option fee imposed by the plaintiff is nothing more than advanced payment for the purchase of the properties. Our view is fortified by the clear stipulation in the option to sell which states unequivocally that the 'option fee shall form part of the deposit of purchase price ...'. It is plain and obvious that the plaintiff was collecting in advance the purchase price which it was prohibited from collecting under reg. 11. The option fee is therefore a guise to circumvent the mandatory requirement of reg. 11(2). That being the case, it is amply clear that the option for sale is an agreement prohibited by law.

[14] It matters not that the payment was placed with the stakeholder as contended by the counsel for the plaintiff. The fact as contended by the plaintiff, that despite becoming aware of such arrangement, the Housing Ministry takes no action on the plaintiff, does not make an illegal contract to become legal. Consideration which is forbidden by law is not lawful as provided under s. 24 of the Contracts Act. An agreement with unlawful consideration and whose object is unlawful is void and unenforceable under s. 25 of the Contracts Act.

[15] In *MK Retnam Holdings Sdn Bhd v. Bhagat Singh Surian Singh* [1985] 1 CLJ 520; [1985] CLJ (Rep) 199; [1985] 2 MLJ 212 the Supreme Court held that an agreement which is in violation of the letter and spirit of the Housing Developers (Control and Licensing) Rules

A 1970 should not be allowed to stand. The option to sell agreement in the present case is in our view, an agreement whose admitted aim was to defeat the object of the regulation and should not be enforced by the court.

B **[16]** For the reasons above, we find that the learned High Court Judge had erred in upholding the option for sale as a conditional contract. We therefore set aside the order of the High Court. We allowed the counter claim of the defendant for a refund of the option fee of RM150,000 with 4% interest from the date of judgment at the High Court to full realisation. We also award costs of RM15,000 to the defendant here and

C the courts below.

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